FILE COPY

FILED
MAR 18 1940
CHARLES ELMORE CROPLEY
CLERK

No. 635

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

HERBERT TIGNER,
Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

GERALD C. MANN,
Attorney General of Texas,
(Austin, Texas)
GEO. W. BARCUS,
Assistant Attorney General,
(Austin, Texas)
LLOYD DAVIDSON,
State Criminal Attorney,
(Austin, Texas)
DAN W. JACKSON,
Criminal District Attorney,
Harris County,
(Houston, Texas)
C. K. BULLARD,
(Dallas, Texas)
Attorneys for the State of Texas

FIRM FOUNDATION—AUSTIN

INDEX

General Index	Pages
Preliminary Statement	1
Counter Propositions	3-4
Argument and Authorities	4-44
Conclusion	45

AUTHORITIES

Agricultural Adjustment Act by Congress	12, 13, 40
Agricultural Marketing Act by Congress	13, 17
The Bankhead-Jones Farm Tenant Act by Congress	15, 40
The Clayton Act Passed by Congress	10
The Capper-Volstead Act by Congress	11, 15, 40
Cooperative Marketing Act by Congress	11, 40
Commodity Exchange Act by Congress	11, 40
Commerce and Trade Act by Congress	14
The Emergency Farm Mortgage Act by Congress	16, 40
The Internal Revenue Act by Congress	15, 40
The Lever Act by Congress	11, 14
Frazier-Lempke Act by Congress	37, 40

AUTHORITIES—Continued

	Pages
Packers & Stockyards Act by Congress	12, 40
The Rural Electrification Act by Congress	16, 40
The Social Security Act by Congress	15, 40
Articles 5737 to 5764, Revised Statutes of Texas, being Texas Cooperative Marketing Act	10
Article 7065-a (13) Revised Statutes of Texas	16
Article 6675-a (6a) Revised Statutes of Texas	16
Article 8, Sec. 19 Texas Constitution	16
Article 827-a, Sec. 3, Penal Code of Texas	16
American Sugar Refining Co. v. Louisiana, 179 U. S. 89	30
Aero Mayflower Transit Co. v. Georgia Public Service, 295 U. S. 285	20
Board of Trade of Kansas City v. Milligan, 90 Fed. (2) 895	11
Cox v. State of Texas, 202 U. S. 446	19, 41
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	20, 34, 39
Clark v. Paul Gray, Inc., 306 U. S. 583	24
Dixie-Ohio Express Co. v. State Revenue Commission, 306 U. S. 72	27
International Harvester Co. v. Missouri, 234 U. S. 199	29

AUTHORITIES—Continued

	Pages
Kalb, et ux v. Fuerstein, 60 Sup. Ct. 343	24
Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Ass'n., 276 U. S. 71	23
Lindsley v. Natural Carbonic Co., 220 U. S. 61	4
Mulford v. Smith, 307 U. S. 38	25
Nebbia v. People of New York, 291 U. S. 502	21
Sproles v. Binford, 52 Fed. (2) 730; Aff. 59 S. Ct. 581	17
Silver v. Silver, 280 U. S. 117	28
Ex Parte Tignor, 132 S. W. (2) 885	2, 6
United States v. Rock Royal Cooperative, Inc., 307 U. S. 533	17
United States v. Borden Company, 60 Sup. Ct. 182	33
H. P. Welch Co. v. State of New Hampshire, 306 U. S. 79	26
Weed v. Lockwood, 266 Fed. 785	15, 30
41 Corpus Juris, p. 167	11
6 R. C. L., p. 411	11
8 Thompson on Corporations (3 ed) Sec. 6770	11

No. 635

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

HERBERT TIGNER,
Appellant,

vs.

THE STATE OF TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS

PRELIMINARY STATEMENT

The appellant, Herbert Tigner, together with Fred H. Tinch, C. H. Valentine and J. Earl Hogue were charged by indictment in Harris County, Texas, of violating the anti-trust laws of the State of Texas, they being charged with having entered into a conspiracy to fix the retail price of beer (R 1).

Appellant sued out a writ of habeas corpus before the district judge in Harris County, Texas, asking that he be discharged from custody on the sole ground that the indictment was void because the penal anti-trust statutes of the State of Texas (being Articles 1632 to 1644 inclusive of said penal code) on which the indictment was predicated violated the "due pro-

cess" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the State of Texas, because Article 1642 thereof provides:

> "No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser * * *" (R 4-5).

The trial court refused to discharge appellant but remanded him to the custody of the sheriff (R 10-11).

The Court of Criminal Appeals of Texas, being the court of last resort in criminal matters in Texas, affirmed the judgment of the trial court and remanded appellant to the sheriff (R 33).

The anti-trust statutes of Texas as contained in the Penal Code of Texas are set out in their entirety in the opinion rendered by the Court of Criminal Appeals of Texas, being Articles 1632 to 1644, incl., of the Penal Code (R 12-17).

The opinion of the Court of Criminal Appeals appears in the record (R 11-35) and is reported as ex parte Tigner, 132 S. W. (2d) 885.

The only question presented to this court is whether the entire penal anti-trust law of Texas is unconstitutional and therefore void because of the provision contained in Article 1642 of said Act, which reads:

"No provision of this law shall apply to agricultural products or live stock in the hands of the producer or raiser."

Said Article makes further exceptions but none of those are presented to this court for review.

Putting the question in a different way, are agricultural products and livestock in the hands of the producer or raiser a reasonable or a rational classification which the Legislature of Texas could exempt from the provisions of the criminal feature of the anti-trust law.

The State of Texas presents the following counter proposition to those made by appellant.

FIRST COUNTER PROPOSITION

The classification provided in the anti-trust statutes of Texas under review, namely: "No provision of this law shall apply to agricultural products or livestock in the hands of the producer or raiser" is based upon a reasonable classification and same does not offend against the "due process" and "equal protection" of Section 14 of the Fourteenth Amendment to the Federal Constitution.

SECOND COUNTER PROPOSITION

The exemption provided in Article 1642 of the Penal Code of Texas applies alike to all persons and

to all agricultural products or livestock while in the hands of the producer or raiser, and there is no unreasonable discrimination against any person because agricultural products and livestock while in the hands of the original producer or raiser is a distinct classification and one which, under the rules of construction, the Legislature of Texas was authorized and empowered to make.

ARGUMENT AND AUTHORITIES ON THE QUESTION RAISED

In determining whether a legislative act of a state which exempts any named class from its provision is constitutional, the Supreme Court in *Lindsley* v. *Natural Carbonic Co.*, 220 U. S. 61, in upholding a statute of New York which made it unlawful to pump or otherwise draw mineral water from a well made by boring and/or drilling into the rock but which statute did not apply to mineral water taken from wells drilled without going into the rock laid down, we think, two fundamental rules, namely:

1. The construction given to a statute by the highest court of the state where the law was passed should be given great weight by the Supreme Court.

2. If the classification made by the legislature is reasonable and/or rational on any theory same should be and will be upheld by the court because such exemption would be a policy to be determined by the

legislature and not by the courts and in so doing the court used this language:

"Coming to the provision in question, it is necessary to inquire what construction has been placed upon it by the highest court of the state, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution. Weightman v. Clark, 103 U. S. 256; Morley v. Lake Shore and M. S. R. Co., 146 U. S. 162; Olsen v. Smith, 195 U. S. 333. * * *

"Because the statute is directed against pumping from wells bored or drilled into the rock, but not against pumping from wells not penetrating the rock, and because it is directed against pumping for the purpose of collecting the gas and vending it apart from the waters, but not against pumping for other purposes, the contention is made that it is arbitrary in its classification, and consequently denies the equal protection of the law to those whom it affects.

"The rules by which this contention must be tested, as is shown by repeated decisions of this court are these: 1. The equal-protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause

merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Bachtel v. Wilson, 204 U. S. 36; Louisville and N. R. Co. v. Melton, 218 U. S. 36; Ozan Lumber Co. v. Union County National Bank, 207 U. S. 251; Munn v. Illinois 94 U. S. 113; Henderson Bridge Co. v. Henderson, 173 U. S. 592; * * *

"In conclusion upon this point, it suffices to say that the case as presented, instead of plainly disclosing that the classification is arbitrary, tends to produce the belief that it rests upon a reasonable basis."

With the above principles laid down as a guide for the determination of the validity or constitutionality of the statutes of the respective states, we desire to first call the court's attention to the construction placed on the statute in question by the Court of Criminal Appeals in the case at bar, being fully stated in ex parte Tigner, 132 S. W. (2) 885, the court used this language:

"The first anti-trust statute (of Texas) was enacted in 1889. It embraced a provision exempting from its operation agricultural products or livestock while in the hands of the pro-

ducer or raiser. The same exemption was made a part of the Anti-Trust Act of 1895 which also carried an exemption in favor of laborers, organized for the purpose of maintaining a 'standard of service.' In 1894 the Anti-Trust Act of 1889 came before the Court of Civil Appeals of the 4th Supreme Judicial District of the State in the case of Anheuser-Busch Brewing Ass'n. v. Houck, 27 S. W. 692. In sustaining the exemption relating to agricultural products and livestock, the court said: 'It is apparent that all persons, of every class, upon whom the act professes to operate, are treated without distinction. This feature of a general statute is held to be the test whether it is or not obnoxious to that objection, and we believe the act to be valid.' When the case was considered by the Supreme Court of Texas the classification was again sustained, the court saying: 'For the reasons given by the Court of Civil Appeals, we also agree with them in holding that the Act is not in violation of the constitution' Houck v. Brewing Association, 88 Tex. 184. In 1898 the Anti-Trust Act of 1895 was considered by the Court of Civil Appeals of the Third Supreme Judicial District of the state in the case of Waters-Pierce Oil Company v. State, 44 S. W. 936. In overruling the contention that the classification was repugnant to the equal protection clause of the Fourteenth Amendment, the court said: 'The domestic welfare of the people of this state is within the keeping of its legislatures, and they are supposed to best know their wants and necessities and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy, and that are necessary in order to extinguish or prevent evil and harmful conditions, affecting the general

interest and the public welfare. These are matters political, and relate to the economic affairs of government, and are peculiarly within the knowledge of the law making department thereof. The remedies therefore, lie within the legislative province and are to some extent, confided to their discretion and wisdom * * *

"In pursuit of this policy, conditions might exist which would justify the legislature in creating and providing remedies adequate to suppress the evil, when applied to one class of subjects, which might not, in their opinion, be necessary to be applied to other classes: for the danger to the public welfare from the pursuit of evil by the one class may be of such magnitude, and lead to such disastrous consequences, that corrective measures are absolutely essential to the order of good government, and to the repose and stability of society, while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable under acts denounced so difficult of confirmation at their hands, in injurious effects upon the welfare of the people, that corrective measures are not necessary to be applied to them. Now, combinations and trusts in restraint of trade, and the existence of monopolies which place it within the power of those combining to affect and elevate the prices of commodities in use by the peoples of the world under their enjoyment and necessities are harmful to the welfare of the public, whenever and wherever such conditions are permitted to exist. With the knowledge of this fact within the mind of the lawmakers, the legislature of this state, in the later history and with knowledge of current events, may, with much reason, have concluded that the dan-

ger from trusts and combinations, which in their operation would injuriously affect the people, would be at the hand of the buyer and seller and dealer in commodities, and not at the hands of the producers, and that by reason of the generally admitted necessity of the producers to readily and speedily dispose of their products, and the difficulties in their way to a successful combination, relating to the disposition of their products, little, if any, danger to the public could be apprehended from that source. The legislatures of the state are supposed to have acted in this matter intelligently, and with the knowledge of the conditions and dangers confronting the people from the combinations and trusts: and it requires little enlightenment to discover that at the time these laws were passed, and now, the disturbing classes which were and now are so injuriously affecting the public welfare, are the buyers, sellers, and dealers in the articles in use by the people of this state. The unbridled license of these classes, which in many instances was exercised, had within this state, as well as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the laymen as well as the lawgiver could discern.'

"The Supreme Court of the state denied the application of the oil company for a writ of error thereby sustaining the validity of the statute. In the case of State v. Compress Company, 95 Tex. 603, the Supreme Court of the state in giving effect to the decision in the Connally case held the anti-trust statute of 1895 to be in conflict with the Fourteenth Amendment. In the course of the opinion the court said: 'The defendant insists that the law

is unconstitutional, therefore void in whole, and will not support the action to forfeit the charter. Upon the same objection we held the Anti-Trust Law of 1889 to be constitutional, and there is no such difference between the two laws as would affect the decision of this question. We believe that our decision is correct: that the law is not in contravention of the constitution of the state nor of the United States. Houck v. Brewing Ass'n., 88 Tex. 189. In the case of Connally v. The Union Sewer and Pipe Line Co., 184 U. S. 539, 22 Sup. Ct. R 437, the Supreme Court of the United States held that a statute of the State of Illinois in all essential particulars the same as the act of 1895, was in conflict with the Fourteenth Amendment to the Constitution of the United States because it excepted 'agricultural products and livestock while in the hands of the producer or raiser.' We recognize the superior authority of the Supreme Court of the United States on this question and in obedience to its decision we shall hold that in so far as the law of 1895 comes within the terms of the Connally case it is invalid * * *"

In this connection we think it proper to call the court's attention to the fact that the tendency of recent state and federal laws is towards a more liberal releasing of agricultural associations, created under the various laws of the states, and especially as demonstrated under the Cooperative Marketing Acts of the various states, from the rigors of anti-trust laws. See Cooperative Marketing Act of Texas, Article 5737-5764, Revised Civil Statutes of Texas; 9 Tex. Jur. pp. 558-564; The Clayton Act passed by Congress October 15, 1914, Sec. 6, c. 323,

38 Stat. 730, U. S. C. A. Tit. 15, Sec. 17; The Capper-Volstead Act passed by Congress February 18, 1922, c. 57, 42 Stat. 388 U. S. C. A. Tit. 7, § 291 and 292; the Cooperative Marketing Act passed by Congress July 2, 1926, c. 725, 44 Stat. 802 U. S. C. A. Tit. 7. Sec. 451-457 and Tit. 12, § 1141; The Lever Act passed in 1918; 41 Corpus Juris p. 167; 6 Ruling Case Law p. 411; 8 Thompson on Corporations (3rd Ed.), sec. 6770, et seq.

RECENT ACTS PASSED BY CONGRESS

In September 1922 Congress passed what is known as the "Commodity Exchange Act" and amended same in June, 1936, ch. 369, § 1, 42 Stat. 998, U. S. C. A. 7, Sec. 1, p. 5. By Section 6 of said Act it was made unlawful for persons to deal in "commodity futures." By Section 6a, subdivision (3) and subsection thereunder (a) there was exempted from the provisions of said Act, "the amount of such commodity such person is raising, or in good faith intends or expects to raise, within the next twelve months, on land which such person owns or leases, U. S. C. A. 7, p. 15. This Act clearly exempts from its provisions farm products raised or to be raised during the current farm year. This Act of Congress was upheld in *Board of Trade of Kansas City* v. *Milligan*, 90 Fed. (2d) 895 in which a writ of certiorari was denied by the Supreme Court, 302 U. S. 710.

On August 15, 1921, Congress passed what is

known as the "Packers and Stockyards Act," U. S. C. A. 7, p. 91, c. 64, § 1, 42 Stat. 159. By Section 191 of said Act, the term "packer" is defined and by Section 182 of said Act the term "commerce" is defined. Under the definitions of the word "packer" and "commerce" the farmers who are the producers are as a class excluded. By Section 192 of the "Packers and Stockyards Act" it is made unlawful for any packer "to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce." This Act recognizes as reasonable the classification of farmers and farm products.

By Section 218b of the "Packers and Stockyards Act" the term "live poultry dealer" is defined as being "a person engaged in the business of buying or selling live poultry in commerce" and by referring to the definition of the word "commerce" as given in Section 182 of said Act it is easily discernable that the producer of live poultry is not embraced therein (U. S. C. A. 7, p. 130).

In May, 1933, Congress passed the Agricultural Adjustment Act, which was amended on June 3, 1937. C. 296, § 1, 2 (a), 50 Stat. 246, Section 601 of said Act, 7 U. S. C. A. p. 261 states:

> "It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit

structure and that these conditions affect transactions in agricultural commodities with the natural public interest, and burden and obstruct the normal channels of interstate commerce."

By Section 602 of such Agricultural Adjustment Act, 7 U. S. C. A. p. 263 the Secretary of Agriculture is authorized to establish and maintain "marketing conditions for agricultural commodities in interstate commerce as well as establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities."

By Section 608-b of the Agricultural Adjustment Act, 7 U. S. C. A. p. 284, it is provided "in order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful."

By Section 671 of the Agricultural Marketing

Act, U. S. C. A. 7, p. 369, it is provided that the Secretary of Agriculture shall have the right to arbitrate the questions that may arise with the Co-operative Association and other organizations for the sale of silk or its products as provided by the Agricultural Market Agreement Act and subdivision (d) of said Section 671, provides:

> "No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the anti-trust laws of the United States."

In the Commerce and Trade Act, 15 U. S. C. A. p. 210, Title 15, passed by Congress in October, 1914, Sec. 17, thereof reads:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

The Lever Act, passed by Congress to prevent the hoarding of food, exempts from its provisions farmers or stockmen, with respect to farm products

raised or produced by them on land owned or rented by them, and the Act was upheld as being a reasonable classification in *Weed* v. *Lockwood*, 266 Fed. 785.

The Internal Revenue Act, passed by Congress in 1934, Title 26, Section 103 (12), 26 U. S. C. A., page 433, exempted from said Act, "farmers, fruit-growers, or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses."

The Bankhead-Jones Farm Tenant Act, passed by Congress July 22, 1937, Chapter 517, 50 Statutes 522, authorizes the Secretary of Agriculture to make loans under certain conditions. Section (b) of said Act provides:

> "Only farm tenants, farm laborers, sharecroppers, and other individuals who obtain, or who recently obtained, the major portion of their income from farming operations shall be eligible to receive the benefits of sections 1001 to 1006 of this title, * * *"

The Capper-Volstead Act, passed by Congress in 1922, 7 U. S. C. A. p. 151, Title 7, Chapter 12, Section 291 and 292, authorized farmers as a class to act together in processing and marketing their products.

The Social Security Act passed by Congress ex-

cludes from its provisions agricultural labor, Title 42, Section 409, U. S. C. A.

The Rural Electrification Act, passed by Congress is 1936; see Agricultural Title 7, Section 901, U. S. C. A. p. 878, specifically provides aid to farmers and rural communities in securing the benefiit of electricity.

The Emergency Farm Mortgage Act, passed by Congress in 1933, authorized loans to farmers as a class to prevent foreclosure on their farms.

TEXAS EXEMPTIONS

In 1925 the State of Texas, by Article 7065a (13), exempted farmers from the payment of the gasoline tax.

By Article 6675a (6a) the Legislature of Texas, in 1934, granted to farmers as such a reduction of 50% on license fees required to be paid for their trucks.

Article 8, Section 19 of the Constitution of Texas exempts from taxation all farm products in the hands of the producer.

Article 827a, Section 3 of the Penal Code of Texas, prescribes the width, length, and height of motor vehicles but exempts from said law, among others: "implements of husbandry." This statute was up-

held in *Sproles* v. *Binford*, 52 Fed. (2) 730 Aff. 59 S. Ct. 581.

In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, the Supreme Court upheld the constitutionality of the Agricultural Marketing Agreement Act passed in 1937 by Congress. Said suit involved the legality of the milk prices and regulations fixed by the Secretary of Agriculture for the sale of milk in the State of New York. The court stated:

"(10) Uniform Price. The Jetter Dairy Company, a proprietary handler, urges that as milk cooperatives need not pay producers a uniform price, it is unreasonable, discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c (5) (f) there is a definition of the type of cooperative permitted to settle with its members in accordance with membership contract. The general characteristics of cooperatives are well understood. The Capper-Volstead Act defines such cooperatives as associations of producers, cooperate or otherwise, with or without capital stock, marketing their products for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealing limited to 50% non-member products. Different treatment has been accorded marketing cooperatives by state and federal legislation alike. (The Clayton Act, Section 6, 38 Stat. 15 U. S. C. A. Section 17; Robinson-Patman Act, Sec. 4, 49 Stat. 1526, 15 U. S. C, A. Section 13b, Capper-Volstead Act, 42 Stat.

388, 7 U. S. C. A. Sec. 291, War Finance Corporation Act, 40 Stat., 506, as amended, 42 Stat. 181, 182. The Grain Futures Act, 42 Stat. 1000, 7 U. S. C. A. Section 7; The Agricultural Marketing Act, 46 Stat. 11, 12 U. S. C. A. Sec. 1141.) Indeed the secretary is charged by this Act to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distrbiution.' These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. In distinction between such cooperatives and business organizations have repeatedly been held to justify different treatment. (Flint v. Stone Tracy Co., 222 U. S. 107; Brushbaber v. Union Pacific Railroad Co., 240 U. S. 1; Chicago Board of Trade v. Olsen, 262 U. S. 1; Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Association, 276 U. S. 71; Tobacco Growers' Association v. Jones, 185 N. C. 265; Kansas Wheat Growers v. Schulte, 113 Kan. 672; Brown v. Staple Cotton Growers' Coop. Ass'n., 132 Miss. 859; Northern Wisconsin Coop. Tobacco Pool v. Bekkedal, 182 Wis. 571; Dark Tobacco Growers' Association v. Dunn, 150 Tenn. 614; Minn. Wheat Growers v. Huggins, 162 Minn. 471; List v. Stearly Tobacco Growers' Coop. Ass'n., 114 Ohio State, 361; Dark Tobacco Growers' Cooperative Ass'n. v. Robinson, 84 Ind. App. 51; Potter v. Dark Tobacco Growers' Coop., 201 Ky. 441; Harrell v. Cane Growers' Coop., 160 Ga. 30; Nebraska Wheat Growers v. Norquest, 113 Neb. 731;

Warren v. Alabama Farm Bureau Cotton Ass'n., 213 Ala. 61. Manchester Dairy System v. Hayward, 82 N. H. 192; Clear Lake Cooperative Livestock Shippers Association v. Weir, 200 Iowa 1293; Hollingsworth v. Texas Hay Ass'n., 246 S. W. 1068; Washington Cranberry Ass'n. v. Moore, 117 Wash. 430; Poultry Producers v. Barlow, 189 Cal. 278; Oregon Growers' Cooperative Ass'n. v. Lentz, 107 Ore. 561; South Carolina Cotton Growers v. English, 135 S. C. 19; Milk Producers Marketing Co. v. Bell, 234 Ill. App. 222; Barnes v. Dairymen's Coop. Ass'n., Inc., 222 N. Y. Supp. 294 * * *

"(23, 24). Delegation to the Secretary of Agriculture. The purpose of the act is to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period.' To accomplish this, the Secretary of Agriculture is directed to issue orders whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act."

In *Cox* v. *State of Texas*, 202 U. S. 466, the Supreme Court, in 1906, held constitutional an act of the Texas Legislature, being Articles 5060-a to 5060-s, inclusive, of the Revised Civil Statutes, 1895, regulating the sale of liquors, which Act required the execution of a bond, and many other very strict regulations to be complied with, by those

who sold intoxicating liquors in Texas, although said Act provided:

> "The provisions of this chapter shall not apply to wines produced from grapes grown in this state while the same is in the hands of the producers or manufacturers thereof."

The Supreme Court held that said exemption did not destroy the act or cause same to be unconstitutional and stated that the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, which had been delivered by the Supreme Court some four years prior thereto, would and did not control the decision in the Cox case.

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, rendered in 1935, the Supreme Court upheld a statute passed by the State of Georgia known as the "Motor Carrier Act of 1931." Said statute prescribed a system of regulation for private carriers for hire. There was exempted from said statute "motor vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points; farm, market, gin, warehouse, or mill, where the weight of the load does not exceed 10,000 pounds, whether such motor-vehicle is owned by the owner or producer of said agricultural or dairy products or not, so long as the title remains in the producer." In upholding the constitutionality of said act, the Supreme Court stated:

"Another exception, and one that more than any other has drawn the appellant's fire, is for the benefit of motor vehicles engaged exclusively in the transportation of agricultural or dairy products, whether the 'vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer.'

"The Supreme Court of Georgia, construing that provision in this case, has said that the final clause 'so long as title remains in the producer' qualifies the entire exception, as indeed it obviously does.

"The (Georgia) court took notice of a common opinion 'well justified by the facts' that the farm land of the state had been 'accustomed to bear undue proportion of the taxes.' The effect of the exception would be to equalize the burden. * * *

"We think the classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good."

In *Nebbia* v. *People of the State of New York*, 291 U. S. 502, the Supreme Court upheld an act of the legislature of that state, passed in 1933, which authorized a milk control board to regulate or fix

the minimum retail price to be charged by stores to consumers for consumption of milk off of the premises where same was sold. The board fixed nine cents as the price to be charged by a store for a quart of milk. The contention was made that said order contravened the equal protection clause and the due process clause of the Fourteenth Amendment to the United States Constitution. In its opinion the court stated:

> "In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livlihood, and the community for an assured supply of milk * * *
>
> "If the laws passed are seen to have a reasonable relationship to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade or commerce is an economic question which this court need not consider nor determine,' Northern Securities Co. v. United States, 193 U. S. 197, * * *
>
> "Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be

annulled unless palpably in excess of legislative power."

In *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Cooperative Marketing Assn.*, 276 U. S. 71, the Supreme Court, in an opinion read by Mr. Justice McReynolds upheld an act of the State of Kentucky which authorized the incorporation of non profit cooperative associations for the orderly marketing of agricultural products which provided that only producers may become members and that the corporation may contract only with them for marketing such products, and which act provides that said association shall not be deemed a conspiracy or an illegal combination or monopoly. The court stated:

"Connolly v. Union Sewer Pipe Co., 184 U. S. 540, is much relied upon. But there the circumstances differed radically from those here presented: and always to determine whether equal protection is denied, there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. * * * The questioned statute (in Illinois) undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the warehouse company did * * *

"It is stated without contradiction that co-

operative marketing statutes substantially like the one under review have been enacted by forty-two states. Congress has recognized the utility of cooperative associations among farmers in the Clayton Act, the Capper-Volstead Act, and the Cooperative Marketing Act. These statutes reveal widespread legislative approval of the plan for protecting scattered producers and advancing the public interest * * *

"The opinion generally accepted—and upon reasonable grounds, we think—is that the cooperative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. American Sugar Refining Co. v. Louisiana, 179 U. S. 89; Cox v. Texas, 202 U. S. 446."

In *Kalb, et ux* v. *Fuerstein*, 60 Sup. Ct. 343, in upholding the constitutionality of the Frazier-Lempke Act, under the terms of which a farmer debter is alone given an opportunity to obtain a three-year moratorium in which to pay his debts, the court stated:

"Congress set up in the act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who as victims of a general economic depression were without means to engage in formal court litigation * * *"

In *Clark* v. *Paul Gray, Inc.*, 59 S. Ct. 744-306 U. S. 583, the court, in 1939, upheld the statute of Cal-

ifornia known as the "California Caravan Act" passed in 1937, which exacted an aggregation of $15.00 in fees for each automobile driven into the state which was operated on its own wheels or in tow of the motor vehicle for the purpose of selling or offering the same for sale within or without the state.

The statute excepted from its operation vehicles moving wholly within either of two zones, fixed by the legislature, which are approximately the northern and the southern part of the state. The court in its opinion stated:

> "Appellees * * * contention is that the statute discriminates between automobiles transported into the state singly and those similarly transported intra zone, for which no fee is charged, and also that the statute discriminates between those cars driven by appellees in caravan and those similarly driven wholly within either of the state zones, for which no fee is charged. * * *
>
> "The legislature, having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it was without any substantial basis. Carley and Hamilton v. Snook, 281 U. S. 66; Continental Baking Co. v. Woodring, 286 U. S. 352; Sproles v. Benford, 286 U. S. 374; Hicklin v. Coney, 290 U. S. 169; Aero Mayflower Transit Co. v. Public Service Commission, 295 U. S. 285."

In *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648,

the Supreme Court, in upholding the constitutionality of the Agricultural Adjustment Act of 1938 as applied to the tobacco industry, stated:

> "Section 311 of said Act is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects industry and farm commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost or wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing with the consequences that abnormal excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supplies burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products; and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster, and obtain an orderly flow of tobacco in interstate and foreign commerce * * * "

In *H. P. Welch Co.* v. *State of New Hampshire*, 306 U. S. 79, 59 Sup. Ct. 438, the Supreme Court held constitutional a statute which declared it to be unlawful for any driver or operator of motor vehicles for transportation of property to be on duty continuously for more than twelve hours, which ex-

empted from its provisions those "who haul or use their trucks for transporting products of their own manufacture or labor, and motor vehicles not principally engaged in the transportation of property for hire or operating exclusively in a city or town, or within ten miles of its limits, or beyond the ten-mile limits, or not more than two trips in thirty days." The court stated:

> "We are of the opinion that for reasons given above, those stated by the State Supreme Court in this State and by this court in Dixie-Ohio Express Co. v. Georgia Commission, 306 U. S. 72, 59 S. Ct. 435, decided this day, the classification in question does not conflict with the rule of equal protection."

In *Dixie-Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 59 S. Ct. 435, the Supreme Court upheld a statute of the State of Georgia, which required operators of motor trucks for hire to pay a much larger fee than it did of those who operated their trucks not for hire, the court stated:

> "(9) Is the Act repugnant to the equal protection clause? Appellant insists that it is because of the higher taxes imposed on those who haul for hire. But it fails to show lack of facts sufficient to justify the discrimination. In the absence of proof to the contrary, it is to be assumed that the use of the roads by one hauling not for hire is generally limited to transportation of his own property as an incident to his occupation or business and that it is substantially less than that of one who is engaged

in the business of common carrier thereon for hire. As hauling not for hire is likely to be occasional and accessory and as hauling for hire is a business, the success of which depends on the loading of the vehicles used and mileage made by them, the classification complained of may not be held arbitrary or without reasonable foundation. Morf v. Bingaman, 298 U. S. 407; Aero Mayflower Transit Co. v. Georgia Commission, 295 U. S. 285; Hicklin v. Coney, 290 U. S. 169; Continental Baking Co. v. Woodring, 286 U. S. 352; Bradley v. Public Utility Commission, 289 U. S. 92; Alward v. Johnson, 282 U. S. 509; Bekins Van Lines v. Riley, 280 U. S. 80; Packard v. Banton, 264 U. S. 140. Appellant's contention that the Act violates the equal protection clause is without merit."

In *Silver* v. *Silver*, 280 U. S. 117, the Supreme Court upheld the statute of Connecticut, which provided that no person transported by the owner of a motor vehicle as his guest without payment of a fee should have a cause of action for damages against such owner, unless such accident was intentional on the part of the driver or was caused by his heedless or his reckless disregard of the rights of others. The statute was attacked on the ground that the exemption applied only to motor vehicles and not to other classes of vehicles, such as carriages, railroads, etc. The court stated:

"Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regula-

tion, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. (cites authorities)

"In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of their gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. (cites authorities) It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

In *International Harvester Co.* v. *Missouri, ex rel Attorney General*, 234 U. S. 199, the Supreme Court upheld the anti-trust statute of Missouri which exempted therefrom persons selling labor and service and exempted purchases of the products sold. The court stated:

"The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited demonstrate that some latitude must be allowed the legislative judgment in selecting the 'basis of community.' We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves

> untouched.' Missouri, Kansas & Texas Ry. Co. v. May, 194 U. S. 267; Williams v. Arkansas, 217 U. S. 79; Watson v. Maryland, 218 U. S. 173 * * *
>
> "It is said that the statute as construed by the Supreme Court of the State comes within our ruling in Connally v. Union Sewer Pipe Co., 184 U. S. 540. But we do not think so."

The American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, involved a statute of Louisiana which levied a tax on parties carrying on the business of refining sugar and molasses, but exempted therefrom "planters and farmers grinding and refining their own sugar and molasses."

In upholding said statute against the claim that the exemption was an unjust discrimination, the court said:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. * * *
>
> "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The Circuit Court of Appeals for the Second Circuit in *Weed* v. *Lockwood*, (1920) 266 Fed. 785, in upholding the Lever Act passed by Congress, which

prohibited the hoarding of food and other products but exempted from its provisions farmers and stockmen with respect to the farm products raised or produced by them, stated:

"It is contended that the statute in question is an arbitrary class legislation, and therefore in violation of the constitution Sec. 4 (of the Act) provides:

" 'Provided, that this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the *farm products produced or raised upon land owned, leased, or cultivated by him.*' (Italics ours)

"It is argued that farmers, gardeners, ranchmen, dairymen, or stockmen, or other agriculturists, with respect to other farm products, may make unjust and unreasonable rates and charges with impunity, but that, if the miners of coal, manufacturers and dealers in farm machinery and equipment, refiners of sugar, or dealers in food products do so, they violate the act. Therefore there is a discrimination of class. The power of classification has had a very broad range. In Atchison, Topeka & Santa Fe R. R. v. Matthews, 174 U. S. 96; 19 Sup. Ct. 609; 43 L. Ed. 909, the court said:

" 'The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.'

"Whether it would have been better policy to have included the farmer or ranchman, or not to have made such a comprehensive classification as the statute does, is not within our province to decide. Whether the existing circumstances and the times call for such a rule of conduct as to exclude farmers from the purposes of the act was a matter for the Congress to decide. Congress could make this classification, and it be held not in contravention of the constitution. International Harvester Co. v. Missouri, 234 U. S. 199; 34 Sup. Ct. 859; 58 L. Ed. 1276; 52 L. R. A. (N. S.) 525.

"Some latitude must be allowed to legislative judgment in selecting the basis of community. It must be palpably arbitrary to authorize a judicial review of it, and it cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. M. K. & T. Ry. Co. v. May, 194 U. S. 267; Williams v. Arkansas, 217 U. S. 79.

"Here Congress has limited the exemption from the operation of the statute to farmers, gardeners, and agriculturists only with respect to *products of the land produced upon land owned, leased or cultivated by them.* (Italics ours) Congress may have had in mind the encouragement of the farmers to large production. It was essential to have full production from land in the emergency."

Appellant claims to get comfort out of the opinion rendered by the Supreme Court on December 4,

1939, in *United States of America* v. *Borden Company*, 60 Sup Ct. 182, where the defendants were charged with violation of the Sherman Anti-Trust Statutes. We think the opinion in said case strengthens the position of the State of Texas that the classification made in our anti-trust statutes which exempts "farm products and livestock in the hands of the original producer or raiser" is a reasonable and a rational classification.

In the Borden Company case the defendants who were distributors of milk, which included a number of corporations, the Pure Milk Association for Producing Milk, The Milk Wagon Drivers' Union, and certain public municipal officers and other parties were charged with having entered into a conspiracy for the purpose of fixing the retail price of milk. The defendants claimed to be protected under and by virtue of the Agricultural Marketing Agreement Act as passed by Congress. The Supreme Court held that said Act did not go to such length and that the defendants could not hide behind said Act if they were doing the things charged in the indictment. The trial court held that said Act was a bar to any prosecution. The Supreme Court in overruling the trial court in that respect stated:

> "We are of the opinion that this conclusion (that the Agricultural Marketing Act protected the defendant) is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see,

to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose.

"An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would, of course, be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go. * * *"

Appellant relies chiefly on the decision of this court in the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, decided thirty-eight years ago.

Since that decision, changed economic conditions have necessitated special legislation for agricultural producers and stock raisers, and by reason of this changed economic condition, Congress, as well as the legislatures of most states have passed a number of laws effecting only farmers and stock raisers, thereby showing it to be a public policy to recognize them as a separate class.

When the Connolly case was decided in 1902, the interests of the farmers were not represented. At that time the economic distinction between agriculturists and stock raisers, and other classes based upon the difference between individual production and group production, was not developed.

When the United States was drawn into the World War in 1917, Congress realized the fact that the farming and stock raising industry was an essential class of work that must be continued in order to feed the army. As a result thereof farmers and stock raisers were in many instances exempted from service in the army. Our nation, recognizing the fact that it is absolutely necessary for the farming and stock raising projects to be continued, have made special gifts and rewards to the farmers.

The Connolly case has frequently been cited in a vain endeavor to induce the courts to declare the standard laws passed by the various states which do classify farmers and stock raisers as a separate class as arbitrary and unreasonable, and the courts have uniformly held that the classifications giving the farmers a preference as a class are binding, legal and proper.

The Connolly case was an action by the Union Sewer Pipe Company to recover the purchase price of sewer pipe delivered to the defendants. The defendants admitted receiving the pipe and using it, and did not dispute the amount due. Their sole defense was that the Union Sewer Pipe Company

was a member of a combination contrary to the Sherman Anti-Trust Law and the anti-trust law of the State of Illinois. The court held that the contracts under which the pipe was delivered had nothing to do with the alleged combination, and that it would be clearly unjust to permit the defendants to escape the payment of the admitted purchase price of the pipe by the collateral pleading of the Sherman Anti-Trust Law, or the common law against trusts and monopolies.

There can be little question but that the actual decision in the Connolly case was fair and just as between the parties to that litigation.

However, it would be unfair and unjust to extend the language of that decision beyond the facts of the case and apply such language to a new and changed condition, which was not known or contemplated when the Connolly case was decided.

Under the Connolly decision this court was called upon to decide only the question as to whether a purchaser from a member of an anti-trust combination should be relieved from paying for the merchandise which he bought, and for which he agreed to pay. Connolly was attempting to take from the Union Sewer Pipe Line Company a large amount of its material in the way of pipe without paying therefor. Connolly was attempting to deprive the pipe line company of its goods and property without paying for same. He attempted to get something for nothing.

Under the Texas anti-trust law, which is under review, trust combines are prohibited, and a violation thereof is made a penal offense of the laws of Texas. Appellant is charged with having violated that law by attempting to control the price of beer. He seeks to be relieved from punishment for controlling the price of beer because he claims that, since "farm products and stock while in the hands of the original producer and raiser" are exempt from the provisions of said law, he should also be exempt. He does not claim to be either a farmer or stock raiser.

As pointed out in this brief, Congress, since the World War, has recognized farmers and stock men as a separate and distinct class in numerous instances. They were exempted from service in the army; their farm products were exempted under the Lever Act; they are exempted from the social security tax; they are authorized to make combinations in order to obtain a better price for their farm products and stock. The Agricultural Marketing Act has been passed for their special benefit. The Frazier-Lempke Act has been passed for their protection. Congress has made large appropriations to help the farmer and the stock raiser as a separate and distinct class. Practically every state in the union has passed cooperative marketing acts which apply alone to farmers, and these acts have been upheld by frequent decisions of this court. Almost every state in the union has passed separate and distinct acts to assist the farmer and the stock men in their rights for an existence. They are the

most needed class in our country because they supply the commodities which give actual life and vitality to the citizenship. No class of people in the nation has been recognized in as many ways and under and by as many laws as have the farmers and the stock raisers during the last twenty-five years. We submit that if farm products and live stock while in the hands of the farmers and stock raisers who produced or raised same is not a reasonable and a rational classification, then all the laws passed for their aid or their support and their salvation will fall, and the decisions of this court, as well as the decisions of the courts of last resort in the various states, would necessarily be overthrown.

We believe we have shown beyond question that farm products and live stock while in the hands of the producer or raiser is not only a reasonable and a rational classification under our present form of government, but that it is an essential and a distinct classification from all other classes in this country. Texas, has a vast domain of land which is suitable alone for stock raising, and another large area suited alone for farming. If the classification is reasonable and/or rational, then this case should be affirmed. If on the other hand, the classification is not reasonable and rational, then this law, as well as all other laws that have been passed by the various states and by Congress should be held invalid for said reason. If the farmer as a class is a reasonable and rational classification for the enactment of laws by Congress, then the farm pro-

ducts and live stock while in the hands of the producer or raiser thereof is a reasonable classification for the anti-trust laws of Texas.

Appellant seems to take the position that the Texas Anti-Trust Statute would permit farmers and stockmen to violate the anti-trust law at all times and under all conditions. Whether that would be a reasonable classification for the Legislature to make or not is not before the court because the law does not exempt them from the anti-trust law except while they are disposing of their farm products and stock which they have personally produced or raised. The law in question exempts from the criminal statutes only farm products and live stock while in the hands of those who produce or raise same. The Legislature of Texas evidently believed that the farmer and live stock raiser who produced farm products or raised stock should be relieved from any possible embarrassment or threatened prosecution by entering into any kind of a combination or marketing agreement through, under or by which they could obtain a better or more satisfactory price for their farm products and live stock.

While appellant states in his brief that the *Connolly* v. *The Union Sewer Pipe Line Co.* case has been cited more than 142 times (we do not know where he received his information) by the courts of the land, he does not cite any other case where the courts have held unconstitutional an act of Congress or any statute passed by a State Legislature which has exempted farmers or stockmen as a class from the pro-

visions of the law although during the past 20 years there have been many such laws passed. As illustrations we again refer to the Co-operative Marketing Acts passed and upheld by the Courts of more than 40 states—The Commodity-Exchange Act by Congress; The Packers and Stockyards Act by Congress; The Agricultural Adjustment Act by Congress; the Commerce and Trade Act by Congress; the Internal Revenue Act by Congress; the Bankhead-Jones Farm Tenant Act by Congress; the Capper-Volstead Act by Congress; the Social Security Act by Congress; the Frazier-Lempke Act by Congress; the Rural Electrification Act by Congress; the Emergency Mortgage Act by Congress, all of which classified the farmers and/or stockmen as a distinct class. To the contrary each of the above laws and acts have been held constitutional and farmers and/or stockmen have been held to be a reasonable classification for legislative purposes.

While the Connolly case has been often cited by the Courts, it has many times been distinguished, and this Court has never, so far as we have been able to find, since it was rendered, held that farmers or stockmen or farm products and livestock were not a reasonable or rational classification for Legislative enactments.

Shepard's Citator shows that this court has cited the Connally case in only 23 cases, which involved the reasonableness of class classification made by law-making bodies. This court upheld 17 of said laws and held that 6 contained unreasonable classifi-

cation. None of the laws held unconstitutional by reason of the classification referred to or in any way involved farmers or stockmen or farm products. The Connally case has been many times cited on other questions.

As early as 1906 this court in *Cox* v. *The State of Texas*, 202 U. S. 446, upheld a Texas statute almost identical with the Anti-trust Statute now under review. In the Cox case this court held the statute of Texas which required all those selling intoxicating liquors to execute bonds and operate their places of business under very close scrutiny and regulations, but which exempted therefrom "wines produced from grapes grown in this state while the same is in the hands of the producer or manufacturers thereof" was not unconstitutional because of said exemption.

There is a vast difference between farmers and livestock raisers who are producing the necessary food and meat to supply the necessities of life and those men like appellant who are combining their money, skill, time and brains to control the price of beer. The mere statement of the case shows there is a reasonable basis for the classification of "farm products and livestock while in the hands of the producer or raiser."

DECISIONS CITED BY APPELLANT

In most of the opinions of this court cited by appellant, the statutes of the states attacked because of an unreasonable classification were upheld.

In *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, cited by appellant, the statute of Louisiana was upheld which exempted the raisers of sugar and molasses from the provisions of said act.

In *Barbier* v. *Connally*, 113 U. S. 27, cited by appellant, the Supreme Court upheld the act of California, which regulated the conduct of laundries.

In *Carroll* v. *Greenwich Insurance Company*, 119 U. S. 401, cited by appellant, the statute of Iowa regulating insurance agencies was upheld.

In *Citizens Telephone Company* v. *Fuller*, 229 U. S. 322, cited by appellant, the statute exempting from taxation small telephone plants in the State of Iowa was upheld.

In *Cornelius Billings* v. *Illinois*, 188 U. S. 97, cited by appellant, the inheritance tax law passed by that state was upheld.

In *Cox* v. *State of Texas*, 202 U. S. 446, cited by appellant, the Texas statute was upheld which exempted from the liquor law grapes and manufactured wine from grapes in the hands of the producer of the grapes.

In *Dominion Hotel Company* v. *Arizona*, 249 U. S. 265, cited by appellant, the law of Arizona, which exempted railroad restaurants from the law regu-

lating restaurants generally, was upheld as a valid classification.

In *Geer* v. *Connecticut*, 161 U. S. 519, cited by appellant, the bird law passed by the state of Connecticut was held a valid classification.

In *Hayes* v. *Missouri*, 120 U. S. 68, cited by appellant, the law of Missouri, regulating the challenge of jurors in the trial of criminal cases, was held valid as a reasonable classification.

In *Liberty Warehouse Company* v. *Burley, T. G. M. Association*, 276, U. S. 71, cited by appellant, the law passed by the state of Kentucky, regulating the sale of tobacco, was held valid.

In *Missouri* v. *Lewis*, 101 U. S. 22, cited by appellant, the law regulating appeals in certain cases in Missouri, was held valid as a reasonable classification.

In *Otis* v. *Parker*, 187 U. S. 606, cited by appellant, the act passed in the state of California, regulating the sale of stock, was held valid as a reasonable regulation.

In *Ozan Lumber Company* v. *Union County National Bank*, 207 U. S. 251, cited by appellant, the law of Arkansas, regulating the kind of note to be taken when patented goods were sold, was upheld as a valid regulation.

In *Patsone* v. *Commonwealth of Pennsylvania*, 232 U. S. 138, cited by appellant, the game law of Pennsylvania was held constitutional as being a reasonable classification.

In *H. P. Welch Company* v. *New Hampshire*, 306 U. S. 79, the law regulating drivers of motor buses was upheld as being a reasonable classification.

Appellant did not cite a single opinion from this court that held unconstitutional any act of Congress or statute of any legislature, classifying farmers and stockmen or farm products, save and except the Connally case.

The state of Texas deems it proper to call this court's attention to what it considers an unwarranted attack upon the fidelity and trustworthiness of the attorneys general of Texas as contained in appellant's brief so that the court may take such action as it desires relative thereto. The remark of which complaint is made is set out on page 19 of appellant's brief, and is the underscored portion of the following statement:

> "The owners of these ranches (in Texas) may agree that they will not sell their cattle for less than ten cents a pound. This agreement would be a violation of the Civil Anti-trust laws of Texas, and the ranchmen making this agreement, *provided the Attorney General of the State of Texas thought it not politically inexpedient*, could be subjected to such penalties as are prescribed by the Civil Anti-trust statutes."

This remark is not germane to any issue in the case, and casts an undeserved reflection upon the attorney generals of Texas, both past and present, and is a wholesale indictment against the men who may be in the future, as well as those who have been in the past, elevated to the high office of Attorney General of the Lone Star State.

The State of Texas prays that the judgment of the Court of Criminal Appeals of Texas in this case be in all things affirmed.

William A. Vinson, Charles I. Francis and Vinson, Elkins, Weems & Francis of Houston, Texas, counsel for appellant, have been furnished copies of this brief.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas,
(Austin, Texas)

GEO. W. BARCUS,
Assistant Attorney General,
(Austin, Texas)

LLOYD DAVIDSON,
State Criminal Attorney,
(Austin, Texas).

DAN W. JACKSON;
Criminal District Attorney,
Harris County,
(Houston, Texas)

C. K. BULLARD,
(Dallas, Texas)

Attorneys for the State of Texas